

No. 12760

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate
of TWENTY-NINE PALMS AIR ACADEMY, *et al.*,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

I.

Preliminary Jurisdictional Statement.

The within appeal is taken pursuant to Order of this Court [Tr. 106-108] upon appellant's petition under Section 24(a) of the Bankruptcy Act, 11 U. S. C., Section 47(a), for the allowance of an appeal from an Order [Tr. 23-29] of the United States District Court for the Southern District of California, Central Division, entered on November 2, 1950, denying appellant's motions [Tr. 3-14, 20-23] to set aside, vacate and dismiss certain Orders entered by the four Referees in Bankruptcy in this jurisdiction in thirty bankruptcy proceedings.

II.

Statement of the Case.

During the period commencing on or about August 8, 1950, to on or about August 17, 1950, appellant received through the mail thirty documents entitled "ORDER AND ORDER TO SHOW CAUSE RE CLAIM FOR SALES TAX." Each of said "orders" was identical in form [Tr. 10-12] and each "order" was accompanied by a document entitled "PETITION FOR ORDER TO SHOW CAUSE AND FOR BAR ORDER, AND FOR HEARING OF TRUSTEE'S OBJECTIONS TO CLAIM." [Tr. 7-10.] These petitions and so-called "orders" were captioned, respectively, in thirty pending bankruptcy proceedings. [Tr. 23-25.]

The "ORDER AND ORDER TO SHOW CAUSE RE CLAIM FOR SALES TAX," in each instance, (a) purported to require appellant to file a "verified claim" in each of the aforesaid thirty bankruptcy proceedings for any liabilities which might exist for "sales tax because of any sale made by [Mr. Sampsell] the trustee or receiver in the administration" of each of the aforesaid thirty bankruptcy matters, and (b) purported to enjoin appellant from otherwise thereafter taking any proceedings to enforce collection of such liabilities. The "orders" purported to enjoin appellant from proceeding against Mr. Sampsell, the trustee in each of the bankruptcy proceedings, not only in his capacity as trustee but in his individual capacity as well. Inasmuch as Mr. Sampsell in his individual capacity and appellant were not parties to any of the aforesaid thirty bankruptcy proceedings, appellant moved

before the appropriate Referee in each instance to vacate and dismiss each of the thirty aforesaid "orders." The motions were segregated into four groups according to the Referee having jurisdiction, and each Referee, after the motions were argued (no evidence or testimony of any kind being offered or introduced), denied the motions. The "order" denying the motions in each instance read substantially as the "order" set forth on pages 12-14 of the transcript.

Upon the unanimous refusal of the four Referees in this jurisdiction to vacate and set aside the aforesaid "orders," appellant obtained an Order [Tr. 15-16] consolidating twenty-six of the bankruptcy proceedings for the express purpose of making a single motion before a District Judge to vacate and set aside twenty-six of the aforesaid thirty "orders." Thereafter, an additional Order of Consolidation was obtained [Tr. 18-19] consolidating the remaining four proceedings. It was stipulated by counsel for appellee at the hearing before the District Judge that the motion to vacate and dismiss the "orders" entered in these four additional proceedings [Tr. 20-23] might be heard simultaneously with the motion involving the twenty-six orders which was duly noticed for hearing pursuant to an "Order Shortening Time." [Tr. 17-18.]

No evidence or testimony of any kind was offered or introduced at the hearing had before the District Judge in opposition to appellant's motions to vacate and dismiss,

and after the matter was argued the District Judge made his Order [Tr. 23-29] denying appellant's motions.

The Order of the District Judge was entered on November 2, 1950. [Tr. 29.] A Notice of Appeal was filed by appellant on November 30, 1950 [Tr. 30] concurrently with Petitions to this Court for a writ of prohibition (No. 12740) and for Leave to Appeal. The latter petition was allowed by Order of this Court on December 15, 1950. [Tr. 105-108.] The petition for a writ of prohibition was denied by this Court without opinion.

III.

Specification of Errors.

1. The District Court erred in refusing to hold that the Referees in Bankruptcy did not have jurisdiction to enjoin appellant, a State taxing agency, from enforcing a valid State Taxing statute affording a plain, speedy and efficient remedy in the courts of the State.

2. The District Court erred in refusing to hold that Federal District Courts as a whole do not have jurisdiction to enjoin a State taxing agency from enforcing a valid State taxing statute where a plain, speedy and efficient remedy may be had in the courts of such State.

3. The District Court erred in refusing to hold that neither the Bankruptcy Referee, in each instance, nor the District Judge had jurisdiction of either appellant or Mr. Sampsell in his individual capacity.

4. The District Court erred in failing to recognize that the proceedings before the Referees amounted in effect to suits against the State of California without its consent, in violation of the constitutional principle barring such suits, and without even colorable compliance with Rules 3 and 4 of the Federal Rules of Civil Procedure.

5. The District Court erred in refusing to give recognition to the well-established principle that injunctive relief should be granted only upon a showing of actual or threatened irreparable injury.

6. The District Court erred in failing to give recognition to the provisions of the Bankruptcy Act which require the filing of proofs of claim only with respect to debts due from a bankrupt and not with respect to items of administrative expense.

7. The District Court erred in failing to hold that it had no jurisdiction to determine any controversy which might exist between Mr. Sampsell in his individual capacity and appellant.

8. The District Court erred in failing to give due consideration to the fact that Mr. Sampsell has regularly been engaged in the business of acting as trustee in bankruptcy of numerous bankrupt estates.

ARGUMENT.

A.

It Is Elementary That a State Cannot Be Sued Without Its Consent.

The well established proposition that a state cannot be sued without its consent does not appear to require extended discussion. The applicability of this principle to the factual situation involved herein is clear. Obviously, the referees below were purporting to assert jurisdiction to determine what is in effect a series of actions brought by Mr. Sampsell against appellant to enjoin the collection of taxes which might be due under the California Sales and Use Tax Law.

Section 6931 of the California Sales and Use Tax Law, California Revenue and Taxation Code, Division 2, Part 1, reads as follows:

“No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this part of any tax or any amount of tax required to be collected.”

See, also, Willoughby on the Constitution of the United States, Volume 3, 2nd Edition (1929), commencing at page 384, and at 1396; 49 Am. Jur. commencing at pages 301 and 304.

B.

Appellant and Mr. Sampsell, in His Individual Capacity Were Not Parties to Any of the Instant Thirty Bankruptcy Proceedings.

It is well established that bankruptcy proceedings are proceedings *in rem* (1 Remington on Bankruptcy, 40 *et seq.*) and that upon the commencement of a bankruptcy proceeding by the filing of a petition in bankruptcy the bankruptcy court obtains jurisdiction only of the bankrupt, the bankrupt's estate, and creditors of the bankrupt.

Obviously, Mr. Sampsell in his individual capacity, and any controversy he might have with appellant, are not within the jurisdiction of the Bankruptcy Court. Obviously, appellant, insofar as it might assert any liability against Mr. Sampsell in his individual capacity, is not within the jurisdiction of the Bankruptcy Court. Equally obvious is the fact that appellant, even insofar as it might assert a liability under the California Sales and Use Tax Law against Mr. Sampsell in his capacity as trustee, is not a creditor of the bankrupt.

Reference to the petition filed by Mr. Sampsell in each of the aforesaid thirty bankruptcy proceedings [Tr. 7-10] will affirmatively establish that the "orders" issued by the Referees purported to deal entirely with matters arising subsequent to the commencement of bankruptcy proceedings, and additionally, with possible tax liabilities incurred by Mr. Sampsell in his individual capacity.

C.

The “Orders” Issued by the Referees in Effect Amount to Judgments Against Appellant Rendered in Proceedings to Which Appellant Was Not a Party.

Inasmuch as appellant was not automatically made a party to the aforesaid thirty bankruptcy proceedings upon their commencement, such proceedings being *in rem, supra*, it is apparent that the “orders” amount to judgments against appellant which could not have been obtained by Mr. Sampsell from a District Judge upon the filing of a complaint and the issuance and service of summons in compliance with the Federal Rules of Civil Procedure.

The basis for this statement is the following:

1. A state may not be sued without its consent, *supra*.

2. Section 6931 of the California Sales and Use Tax Law specifically provides that no injunction shall issue in *any suit*, action or proceeding to prevent or enjoin the collection of taxes under the California Sales and Use Tax Law.

3. Congress has specifically removed from the jurisdiction of Federal District Courts the power to enjoin the collection of state taxes under a valid state taxing statute where an adequate remedy exists under state law.

United States Code, Sec. 1341, Revised Title 28;

Alabama Public Service Commission, et al. v. Southern Ry. Co., 341 U. S., 71 S. Ct. 762, 95 L. Ed. (Adv. Ops.) 721.

4. The California Sales and Use Tax Law provides for administrative and judicial review, and the adequacy of the remedies provided has been judicially established by decisions of the Federal Courts in *Nevada-California Electric Corp. v. Corbett*, 22 Fed. Supp. 951, and *Corbett v. Printers and Publishers Corp., Ltd.*, 127 F. 2d 195.

5. Reference to Sections 2281 and 2284 of Revised Title 28, United States Code, makes it clear that even if an injunction is sought against a state officer to restrain the enforcement of a statute alleged to be unconstitutional, application for such injunctive relief must be directed to the three-judge court provided for by Section 2284.

6. If Mr. Sampsell, in each of the thirty instances involved herein, had attempted to bring appellant within the jurisdiction of the Federal District Court by the filing of a complaint and personal service of summons in compliance with Rules 3 and 4 of the Federal Rules of Civil Procedure, he would have been required by Rule 8 of the Federal Rules of Civil Procedure to set forth in his complaint a short, plain statement of the grounds upon which the District Court's jurisdiction might rest. The petitions filed by Mr. Sampsell upon which the thirty "orders" involved herein were issued do not contain such a statement.

D.

The Bankruptcy Act Does Not Require the Filing of Proofs of Claim for Administrative Expense Items.

The Bankruptcy Act requires the filing of proofs of claim with respect to debts due and owing from a bankrupt prior to the commencement of bankruptcy proceedings. It is well established that liabilities incurred by a trustee in the course of his administration of a bankrupt estate are not properly the subject of proofs of claim.

11 United States Code, Sec. 102, Bankruptcy Act, Sec. 62;

2 Remington on Bankruptcy 150, *et seq.*

The referees, appellee and his counsel, and the judge below have not directed appellant's attention to any provision or decision requiring the filing of proofs of claim for administrative expense items. Appellant has been unable to discover such a provision or decision.

E.

Bankruptcy Courts Do Not Have Jurisdiction to Stay Proceedings Against a Trustee in Bankruptcy in His Individual Capacity.

In re Roberts, 169 Fed. 1022;

In re Kalb & Berg Mfg. Co., 165 Fed. 895;

Voss v. Conron Bros. Co., 59 F. 2d 969.

We are not aware of any authority, either statutory or judicial, to support the proposition that a trustee in bankruptcy may seek judicial review in the Federal Bankruptcy Court of state tax assessments levied against him in his individual capacity merely because the assessments

relate to the trustee's activities in connection with the administration of bankruptcy estates. Not a single case was cited by appellee or the United States Attorney who represented the District Court in the prohibition proceedings referred to above to support such a proposition.

F.

The Petitions Upon Which the "Orders" Were Issued by the Referees Below Set Forth No Grounds Justifying the Issuance of an Equitable Writ.

Assuming, *arguendo*, that Mr. Sampsell, in his individual capacity as well as in his capacity as trustee, could properly have petitioned the Bankruptcy Court for the issuance of a restraining order directed to appellant to enjoin the enforcement of the California Sales and Use Tax Law, and assuming, *arguendo*, that the order could have issued despite the provisions of Section 6931 of the California Sales and Use Tax Law, it is elementary that Mr. Sampsell should have been required to make an adequate showing of actual or threatened irreparable injury.

As reference to the record will disclose, not only did appellee's petitions fail to allege actual or threatened injury but, additionally, no showing to that effect was made in opposition to appellant's motions to dismiss. No attempt was made to demonstrate, in Mr. Sampsell's behalf, that the administrative and judicial review provisions of the State statute did not provide an adequate remedy in this instance. No recognition was afforded the decisions of the Federal Courts in the *Nevada-California Electric Corp.*, and *Printers & Publishers Corp.* cases, *supra*.

G.

The True Nature of Mr. Sampsell's Activities Were Not Considered by the Court Below.

This Court's attention is additionally directed to the fact that the District Court should have taken judicial notice of the fact that Mr. Sampsell was regularly engaged in acting as trustee and/or receiver in numerous bankruptcy proceedings (as is evidenced by the fact that he is the trustee in each of the thirty bankruptcy proceedings involved herein), and as such, regularly engaged in making sales of tangible personal property included in the assets of bankrupt estates; and the court below should have considered the tax implications flowing therefrom under the California Sales and Use Tax Law by virtue of the provisions of Sections 959 and 960 of Revised Title 28, United States Code.

It is appellant's contention that appellee, by virtue of his regularly engaging in the business of acting as trustee in bankruptcy under authority of the court below in numerous bankruptcy estates, was clearly subject to the provisions of the California taxing statute, pursuant to Sections 959 and 960, Title 28, United States Code, even if it were to be assumed, *arguendo*, that some doubt on this point otherwise existed.

Conclusion.

The presentation of the within appeal has presented many difficulties to counsel for appellant inasmuch as the "orders" of the referee and Order of the District Judge were entered with complete disregard for what appellant's counsel submits are fundamental, well-established, elementary principles. Counsel for appellant feel some-

what handicapped in presenting this appeal by the failure of appellee, the referees in bankruptcy, the District Judge, the United States Attorney and other counsel who participated in the proceedings below and who opposed the application for a writ of prohibition in *People of the State of California v. United States District Court, etc.*, No. 12740, and, indeed, this Court (in denying the application for a writ of prohibition without opinion), to cite pertinent statutory or judicial authority to support the propriety of the issuance of the "orders" involved herein. In view of the foregoing, we have not attempted to cite the numerous authorities supporting the fundamental principles referred to above but stand ready to do so should the Court desire it to be done.

As was indicated to this Court when counsel for appellant appeared as counsel for the State of California in No. 12740, failure to promptly judicially establish the invalidity of these "orders" would encourage the issuance of additional "orders," perhaps even broader in scope. That prediction has unfortunately come true. To date "orders" similar to those involved herein have been issued in approximately one hundred cases, some of which purport to restrain not merely the appellant, but also the Department of Employment, the District Attorney of Los Angeles County and the City Attorney of the City of Los Angeles, from enforcing the provisions of valid state taxing statutes.

It is respectfully submitted that the invalidity of the "orders" involved herein should be judicially established

by this Court for the reasons set forth above, to enable appellant as well as other State taxing agencies, and the various individuals who act as trustees in bankruptcy in this jurisdiction, to proceed amicably, with due respect for the sovereignty of the State of California and the jurisdiction of the Bankruptcy Court, to determine in an appropriate manner any and all tax controversies which might arise in connection with the administration of bankruptcy estates.

Respectfully submitted,

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